

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-161

In the Matter of

CLARK-BADER, INC.,
d/b/a TMC LONG DISTANCE,
Complainant

v.

File No. E-89-85

PACIFIC BELL,
Defendant

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1993; Released: September 10, 1993

By the Review Board: MARINO (Chairman),
BLUMENTHAL and GREENE.

Board Member GREENE:

1. Before the Review Board are the Appeal from Interlocutory Order of the Presiding Judge and Petition for Extraordinary Relief and Expedited Consideration filed August 19, 1993 by Clark-Bader, Inc. d/b/a TMC Long Distance and the Pacific Bell Opposition to Petition for Extraordinary Relief and Expedited Consideration filed August 27, 1993. TMC Long Distance seeks interlocutory review of discovery rulings of Administrative Law Judge Walter C. Miller dismissing three notices to take depositions on oral testimony and denying two requests for subpoenas ad testificandum, all of which were filed after the ALJ's deadline for starting discovery. *Memorandum Opinion and Order*, 93M-505 (rel. Aug. 5, 1993); *Memorandum Opinion and Order*, 93M-506 (rel. Aug. 6, 1993); *Memorandum Opinion and Order*, 93M-511 (rel. Aug. 9, 1993). The ALJ denied TMC Long Distance permission to appeal his order dismissing the deposition notices. *Memorandum Opinion and Order*, 93M-515 (rel. Aug. 10, 1993), and also noted therein at note 1 that TMC Long Distance's request for permission was not amended to include permission to appeal the subpoena rulings.

¹ When the *Hearing Designation Order*, 8 FCC Rcd 4202, was released on June 23, 1993, both TMC Long Distance and Pacific Bell had pending predesignation motions for extraordinary discovery, which they had filed pursuant to the procedural rules governing common carrier formal complaints. See 47 CFR 1.720, *et seq.* The ALJ granted these in his *Prehearing Order* subject to compliance with his discovery schedule and the Commission's discovery procedures in 47 CFR 1.311, *et seq.*, including section 1.315 which requires written notice to the parties and the ALJ. 93M-426 at 3 and n.4. TMC Long Distance claims that it had reached oral understandings with Pacific Bell regarding schedules for three depositions, but its notices were not filed

2. With the exception of the type of rulings that are appealable as a matter of right under 47 CFR 1.301(a), which are not present here, appeals from the rulings of presiding officers are appealable only if permission is first sought and secured from the presiding officer pursuant to 47 CFR 1.301(b). Where leave to appeal has not been sought or secured, the ruling is final unless the appealing party has established either that there has been egregious error or flagrant abuse of the presiding officer's discretion or that "the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected." *Communications Satellite Corp.*, 32 FCC 2d 533, 534 (1971); see *Jan-Di Broadcasting, Inc.*, 93 FCC 2d 890, 891 (Rev. Bd. 1983). The presiding officer has broad discretion to regulate the course of the evidentiary hearing, and the burden on the party seeking review is heavy to ensure orderly procedure and prevent the continued delays that could occur if proceedings were halted for Review Board intervention in interlocutory matters every time a party was dissatisfied.

3. Here the ALJ expressly denied appeal of his order in FCC 93M-505, and TMC Long Distance, who apparently believed the ALJ would deny permission to appeal additional orders, has not sought the ALJ's permission to appeal FCC 93M-506 or FCC 93M-511. TMC Long Distance argues that its appeal should be heard nonetheless and it should be allowed to depose the five individuals identified in its deposition and subpoena requests because it complied with the spirit if not the letter of the presiding officer's *Prehearing Order*, 93M-426 (rel. June 30, 1993),¹ and the requested individuals may be important to resolving public as well as private interest aspects of the designated issues.² These arguments do not satisfy the stringent *Communications Satellite Corp.* test. Moreover, we note that the ALJ has not precluded informal discovery of the three witnesses TMC Long Distance sought to depose and has not precluded calling one or more of them as adverse witnesses during the hearing. See *Memorandum Opinion and Order*, FCC 93M-515 at 2 ¶ 6. When denying the interlocutory appeal, the ALJ pointed to informal interviews as a means by which the parties "should be able to obtain the factual data they need to properly prepare for trial; i.e., they will know whether they need to call one or more of the three as adverse witnesses. About the only thing they won't be able to do is to *officially* lock-in any future testimony of these three people." *Id.*³ Although TMC Long Distance compares the adverse rulings here to the denial of all but voluntary discovery in *The Bunker-Ramo Corp. v. The Western Union Telegraph Co.*, 38 FCC 2d 860 (Rev. Bd. 1972), which ultimately resulted in a remand for a trial *de novo*, we are in no position to assess the impact of the ALJ's ruling or determine whether TMC has a redressable

with the ALJ until after his deadline for starting discovery. The ALJ ordered that the untimely notices be dismissed and the depositions not be taken. 93M-505 at 2. No understanding is alleged regarding the two individuals who were the subjects of the subpoenas filed after the ALJ's deadline for starting discovery.

² The designated issues concern Pacific Bell's provision of interstate access services to TMC Long Distance. See *Hearing Designation Order*, 8 FCC Rcd at 4204.

³ See generally 47 CFR 1.311(e) (permitting written stipulations regarding the taking of depositions if there is no interference to the conduct of the proceeding).

grievance analogous to that ultimately found in *Bunker-Ramo* from our limited pre-hearing perspective here. Objections to the ALJ's rulings "may be raised on review of the Initial Decision," 47 CFR 1.301(b)(1), as they were in *Bunker-Ramo*. In the meantime, TMC Long Distance's unauthorized appeal and its petition for extraordinary relief will be dismissed.

4. ACCORDINGLY, IT IS ORDERED That the Appeal from Interlocutory Order of the Presiding Judge and the Petition for Extraordinary Relief and Expedited Consideration filed August 19, 1993, by Clark-Bader, Inc. d/b/a TMC Long Distance ARE DISMISSED.⁴

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

⁴ Because of the time element involved -- the *Prehearing Order* provides that discovery must be completed by September 17, 1993 and written direct affirmative cases submitted at the Sep-

tember 21 prehearing conference, we have provided prepublication copies of this *Order* to the parties and the ALJ.